STATE OF MICHIGAN

IN THE SUPREME COURT

CITIZENS INSURANCE COMPANY,

Plaintiff,
Counter-Defendant-Appellant,

v

PRO SEAL SERVICE GROUP, INC., d/b/a PRO SEAL, INC., a Michigan corporation,

Defendant,
Counter-Plaintiff-Appellee,

and

FLOWSERVE CORPORATION, A New York corporation, FLOWSERVE MANAGEMENT COMPANY, a Delaware corporation, SETH SHORT and RANDY QUINCY,

Defendants.
_____/

Supreme Court No. 130099

COA Docket No. 262759

Lower Court: Oakland County
Circuit Case No. 04-056953-CZ

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DEFENDANT, COUNTER-PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court has given the parties an opportunity to file supplemental briefs addressing the issue of whether the Flowserve Complaint alleges a "personal and advertising" issue within the meaning of the commercial insurance policy issued by Citizens, and whether Citizens was relieved of its duty to defend based upon the exclusion for acts undertaken with knowledge that an advertising injury would result. The Court has directed that the supplemental briefs avoid repeating the arguments made in the almost 100 pages contained in the previous briefs.

The Circuit Court Opinion assumed that there was coverage under the policy, but found that the exclusion applied. The Court of Appeals Opinion analyzed both the issue of coverage and the issue of exclusion, and found that there was coverage and the exclusion did not apply for the reason that the Flowserve Complaint included causes of action for which the question of intention was irrelevant.

THE STANDARD OF THE LAW

The responsibility owed by an insurance company to defend its insured is clear. The insurance company is obligated to examine the complaint filed against the insured and look at the substance of what is alleged. The precise terms of the complaint and the technicalities of how a cause of action are stated are not important. There are no particular magic words that cause the duty to defend to arise. A mixture of causes of action which are covered and causes of action which are not covered is irrelevant. The insurance company is duty bound to look behind the pleadings to determine whether there are any allegations which arguably fall within the policy coverage and to defend if recovery under a covered theory is arguable.

Both the Plaintiff and the Defendant agree as to the standard set by law and cite the following

passage in *American Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440; 450-452. 550 NW2d 475 (1996). *American Bumper*:

> "If the allegations of a third party against the policyholder even arguably come within the policy coverage, then the insurer must provide a defense. *Polkow v Citizens Ins. Co.,* 438 Mich 174, 178, 180, 476 NW2d. 382, (1991); *Allstate Ins. Co. v Freeman,* 432 Mich 656, 662, 443 NW2d 734, (1989)... This Court has also explained:
>
> > An insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are any theories or recovery that fall within the policy. *Dochod v Central Mutual Ins. Co.,* 81 Mich App 63, 264 NW2d 122 (1978) The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Shepard Marine Construction Co. v Maryland Casualty Co.,* 73 Mich. App. 62, 250 N.W.2d 541 (1976) In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. 14 *Couch Insurance, 2d (rev ed),* section 51.45 p. 538 [now section 51.49 p. 489]"

The question now before the Court is whether it is arguable that a theory of recovery is presented in the Flowserve Complaint which would be covered under the Citizens commercial insurance policy.

There are two insurance policies that are involved in this case. There is a commercial policy and there is an umbrella policy. According to Citizens, the umbrella policy provides broader coverage than the commercial policy. (See Footnote 13 at page 36 of Citizen's Application for Leave to Appeal.) This is not an accurate statement in our opinion. Both policies provide broad protection. The terms by which they define coverage is different, and it is possible to conceive of circumstances in which one policy would provide coverage and one policy would not. However, it is not accurate to say that one policy provides broader coverage than the other. It is clear from the

insured's perspective that the purpose for purchasing a commercial policy and an umbrella policy is to obtain the broadest protection that is possible. However, the Court's directive was to address the provisions of the commercial policy, not the umbrella policy.

THE FLOWSERVE COMPLAINT

An analysis of whether coverage is arguable and the duty to defend arises may begin with an examination of the Complaint looking at its substance and looking behind the pleadings where necessary to understand the theories of liability that are asserted.

The Flowserve Complaint alleges that Pro-Seal created confusion in the market place through unfair competition, misleading representations, imitating or infringing trademarks, product marks, and by using trade secrets, blueprints, engineering drawings, packaging materials, and sales related conduct to imitate Flowserve's style of doing business. The Complaint alleged that Pro-Seal was unfairly competing with Flowserve in violation of state and federal law by communicating to the public and to particular customers; verbally, through conduct and in writing through the labeling and packaging of their products that Pro-Seal products and services were the same as Flowserve products and services or were endorsed by Flowserve. (Flowserve Complaint, for example, paragraph 20-22, 25, 34-38). In addition, Flowserve alleged that the acts which constitute the various torts and violations of law were committed willfully and knowingly in an effort to defraud the public and benefit from the good will which had been established in the Flowserve's name. This latter allegation, if proven, would have entitled Flowserve to treble damages and the recovery of attorneys fees. (15 USC 1117) In the event that no evidence of willfulness or knowledge were proven, Flowserve would still recover if proof was offered which showed that there was confusion in the

marketplace or with particular customers as a result of a misleading representation by Pro-Seal.[1] The Flowserve Complaint sought damages for sales lost as a result of the public confusion, and an injunction prohibiting the use or imitation of Flowserve trademarks, trade names, etc. to "market, advertise or identify" a Pro-Seal product. [Flowserve Complaint, Paragraph 59 (v).

Pro-Seal has contended from the beginning that the substance of the allegations arguably set forth, among other things, a theory of recovery based upon an infringement of "trade dress," a term that is used in the commercial policy. Pro-Seal also argues that the allegations of trade mark infringement and unfair competition fall with the coverage of both the commercial policy and the umbrella policy. Citizens offers a different position.

When the incident alleged in the Complaint which actually led to this lawsuit is examined in its substance and a look behind the pleadings is made, a clear example of the conduct at issue and the advertisement used by Pro-Seal with Connoco, BP and the public is seen. In June, 2003, and July, 2003, when two different Flowserve mechanical seals that had been repaired and rebuilt by Pro-Seal were on display sitting on a shelf in a staging area at the Roteq distribution center in Alaska, a Flowserve employee happened to be passing through. [Flowserve Complaint, para 22 (d) & (e)]. Indeed, Flowserve and Pro-Seal both maintain competitive business locations in the same building

---

[1]In order to prevail under the cited Lanham Act provisions, which is known as "false advertising" a plaintiff must show that: (1) the defendant made false or misleading statements about its product in an advertisement; (2) the advertisement actually deceived, or had the tendency to deceive, the targeted audience; (3) the deception is material; (4) the defendant's advertised product traveled in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false or misleading advertisements. See *Hyman v Nationwide Mut. Fire,* 304 F3d 1179, 1196-6 (11th Cir, 2002). There is no requirement that the Defendant have intended to violate the Lanham Act or otherwise have perceived an injury to result. Likewise, under the Alaskan statute, all that is necessary is that there be confusion in the marketplace generated by a misleading statement. AK ST s 45.50.471(3)

with Roteq, along with another third party business, in order to facilitate delivery of their products and services as well as to maintain access to the customers who frequent that center. On two occasions (actually more) during June and July, 2003, a Flowserve employee saw that a Flowserve distinctive package with Flowserve's name and trademark was awaiting delivery to a customer by Roteq, but he also immediately observed that the ProSeal name and source data, and other information concerning the seal had been placed on the package in a prominent red sign which had been affixed to the package. (Affidavit of Bruce M. McCartney, Pro-Seal Brief in Support of Motion for Summary Disposition, p 5-6,) This was not the first time, nor would it be the last time that Pro-Seal used Roteq to distribute and advertise its products. Flowserve made the conclusion from this observance that Pro-Seal was selling a Pro-Seal manufactured seal through Roteq to a customer on the North Slope, and packaging it in a Flowserve box using the Flowserve trademark.

If Citizens would look behind the pleadings, it would find that Roteq is a third party vendor in Alaska [Flowserve Complaint, para. 22(d)] engaged in the sale and distribution of seals and other supplies to companies located on the North Slope of Alaska. Although there was no further explanation provided in the Complaint as to the business of Roteq, if the insurance company had looked behind the pleadings as they are required to do, it would have found that Roteq's place of business is a place where company representatives and customers are invited, welcomed and expected. The Pro-Seal advertisement on top of the Flowserve packaging was there for anyone and everyone on the Roteq premises to see (Flowserve Complaint, Para. 22 (d) & (e), Exhibit 6). The Pro-Seal advertisement on top of the Flowserve package could and would be observed by members of the general public who were visiting the distribution center or conferring with Roteq, Flowserve, Pro-Seal or any other business that located itself in those premises. Indeed, it was hoped and

planned by Pro-Seal that knowledge of their services would become even more widely known through use of a prominent red label displayed on product packaging. This is a distribution and advertising system.

If Pro-Seal had used different packaging or a less prominent sign on the package, Flowserve may never have found that Pro-Seal had repaired and rebuilt those seals as the means that were used to identify the products was the packaging and the sign. If Pro-Seal had used a non-descript trade dress, or had shipped the products in plain brown wrappers, the cause of action may never have been filed.

Pro-Seal was certainly known to Roteq employees, and through them their products and services could be known to every customer on the North Slope who used the Roteq distribution center. The fact that Pro-Seal was engaged in the repair, rebuilding and remodeling of Flowserve seals was certainly an item of information that Pro-Seal was conveying through the use of its Red Label on the Flowserve package. The fact that Roteq was serving as a middle man in transactions with Connoco and BP, as was suggested by Flowserve's Complaint, [Flowserve Complaint, para. 22. (d) and (e)], provided a fertile source through which to advertise Pro-Seal's products and services. Indeed, the fact that the Flowserve employee observed the products and the signs advertising the source is no different from walking through a hardware store and seeing Black and Decker drills, except in this case the Black and Decker drills were repaired and rebuilt by Pro-Seal and there were prominent red signs on the Black and Decker boxes announcing that Pro-Seal had serviced or rebuilt that product. The label and the package advertise the product and the source. This is the heart of advertising and according to Flowserve, these acts contributed to the alleged confusion in the marketplace, and under these circumstances the duty to defend arises. *Fireman's*

Fund Ins. Co. of Wis. v. Bradley Corp. 261 Wis.2d 4, 660 N.W.2d 666 (Wis. 2003).

Where the standard is whether the allegation "arguably" asserts a covered claim, and the requirement is that you look behind the pleadings to determine the substance of the alleged wrong, as is the case in Michigan, the conclusion that the Complaint includes an allegation that there was an "advertisement" is simply required by logic and experience.

There has been a great deal of debate between Pro-Seal and Citizens as to whether the Flowserve Complaint sets forth a potential theory of recovery based upon a violation of "trade dress." There are as some courts have noted a "bewildering variety of different labels covering the same material facts." *(Hyman, supra, at* 1189-90) Indeed, we believe that Citizens' arguments rely on semantics and not substance, and instead of looking objectively at the policy, they look for some way to find that no coverage exists. We would like to try a different approach in response.

Count II, Paragraph 35 of the Flowserve Complaint provides as follows:

> 35. Defendants have engaged in interstate commerce in the State of Alaska by marketing, offering to sell, and selling Pro-Seal's competing seal products and by providing repair services of flow-management process products. Defendants have competed unfairly in violation of Alaska Law by misrepresenting that Pro-Seal's products are Flowserve products by improperly using Plaintiffs' "P-50", BW/IP®, BW SEALS®, and FLOWSERVE ®, trademarks to identify Pro-Seal's competing product, by misrepresenting that they are authorized or certified Flowserve representatives or distributors, and by misrepresenting that Defendants are authorized or certified by Flowserve to repair its products.

It is apparent that the allegation includes no reference to intention. It simply states that Pro-Seal has "competed unfairly" by "misrepresenting that Pro-Seal products to be Flowserve Products." This is both a factual allegation and a legal conclusion. Count II incorporates the previous 34 paragraphs of the Complaint and it may fairly be said that everything that was alleged against Pro-Seal is contained within the Count II. The particulars of how and where the alleged

misrepresentation occurred is something that would be further refined during discovery, and under the Federal Rules of Civil Procedure discovery would be relatively unlimited, but clearly the use of Flowserve's packaging with Flowserve's trademark on it is one of matters to which they direct their ire. If the allegation of unfair competition is proven, with or without intention, and with or without reference to the remaining allegations of the Flowserve Complaint, then a violation of Alaska Statute AK ST s 45.50.471(3) would be found. No further allegations are needed and no further proof would be needed in order to prevail. Flowserve has alleged a fact, i.e., that Pro-Seal misrepresented the source and origin of its products, it has alleged that there is a violation of law; i.e., the Alaska Unfair Competition Statute, and it has alleged that it is entitled to relief in the form of damages for lost sales and an injunction.

If Flowserve were to prove, as they alleged, that the use of Flowserve's packaging with Pro-Seal's label caused confusion in the marketplace, then they could prevail on a claim of unfair competition. Subparagraph 3 of Alaska Statute AK ST s 45.50.471 provides as follows:

> (3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

The requirements of the statute are a codification of the doctrine of trade dress infringement. Flowserve has set out a claim for trade dress infringement as a subset of unfair competition. There is no requirement under the statute to prove any particular intent. The fact that Flowserve as alleged that there was a mens rea is irrelevant. They are not required to prove a guilty mind simply because they have alleged that there was willfulness. They are simply required to prove that the conduct caused confusion in the market place.

The Lanham Act 15 USC 1125(a) provides the same avenue of recovery. In paragraph 31

of the Flowserve Complaint, Flowserve alleges that the "aforesaid **acts** committed in the course of interstate commerce constitute material false and misleading representations of fact with respect to the origin of Defendant's products and services..." . The allegation does not state that the foregoing acts combined with a particular intent amount to a cause of action. The allegation simply refers to the acts and under the Lanham Act no intention is required. If Flowserve proved that the foregoing "acts" constituted false advertising, then they would recover their damages. They need not offer any proof of intention. It is not until paragraph 33 that Flowserve alleges in a separate paragraph that they are entitled to enhanced damages because, according to Flowserve, Pro-Seal acted with a particular bad intention. Under these circumstance, the claim presented is identical in all substantive characteristics to a claim for infringement of trade dress. It just does not use the magic words: "trade dress." Many courts that have addressed this issue have found that trade dress infringement is a subset of the law under the heading of unfair competition or false advertising. *Two Pesos, Inc v Taco Cabana, Inc,* 505 US 763; 112 S. Ct. 2753; 120 L Ed 2d 615 (1992) at 777-80, *Hyman* at 1187-8. We would also point out the absurdity, that Citizens would argue that there is no advertising alleged in a case clearly based upon allegations of false advertising under the Lanham Act..

The reading of the Complaint argued by Citizens is inconsistent with the Federal Rules of Civil Procedure and inconsistent with the duties of the insurance company. The Federal Rules do not require that each cause of action be separately named or titled. Once a factual statement is made which entitles a Plaintiff to relieve, it is up to the lawyers and the court to apply the law to the facts. FRCivP 8. The fact that a statute may not be cited or a theory may not be artfully pled makes no difference in the substance of the claim. The underlying transaction which gave rise to the Complaint will be examined and the appropriate law applied without regard to the technicalities that

may be presented in setting forth all the elements of a particular cause of action under state law. Citizens would have the Court ignore this fact and rely of semantic distinctions which have no meaning.

THE COMMERCIAL POLICY

THE DEFINITION OF AN ADVERTISEMENT.

The Commercial Policy defines an "advertisement" as follows:

> "Notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." Coverage B, Section V, l.

The definition adopted by the insurance policy is interesting in that it is not a technical definition and does not limit the form that an "advertisement" may take. For instance, the definition does not limit an "advertisement" to a television commercial, a radio spot, a direct mail solicitation, a brochure, the verbal statements of a door to door salesperson, or the label on a product which notifies customers as to the source or brand of the product. Each method of communicating information about a product or service provides knowledge from which additional action may be taken by the customer, and each would qualify as "notice." *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.* 261 Wis.2d 4, 660 N.W.2d 666, (Wis.2003).

"Notice" is a term that has a long history in the courts and is well defined. The definition in *Black's Law Dictionary, Revised Fourth Edition* is:

> Information; the result of observation whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge.

There has been substantial litigation in the constitutional area over what constitutes "notice." Generally speaking, notice, is considered to be knowledge which is sufficient to give a person a

reasonable basis to make inquiry. A practical application of the term "notice" in the context of an advertisement would start with the most fundamental act of notification; that of a salesperson with a label on their briefcase, knocking on a door in an attempt to sell a product and move up to the most sophisticated super bowl television commercial. An "advertisement" begins with a notice; i.e., a communication that is intended to convey an item of fact or other information; a communication that is intended to call attention to a product or its source.

The policy provides no examples or other guidance by which we should refine or limit the meaning beyond the very broad scope of the words which convey in plain English the fundamental idea that an "advertisement" is a communication or notice to the public or particular customer(s), which is intended to distinguish the product's sponsor from its competitors and/or promote the sale of a product or service. It is the insurance company's obligation to define the coverage to be provided. It should not be the responsibility of the courts to save the insurance company from the plain meaning of the terms that are used or artificially limit the scope of the coverage. Indeed, the plain meaning of notice has the added benefit that it is consistent with what would be understood by a normal interpretation of the word "advertisement" and its dictionary definition.

The first definition found in Webster's Ninth New Collegiate Dictionary for the word "advertise" is: "To make something known to: Notify." The definition found in *Black's Law Dictionary, Revised Fourth Edition* is "Notice given in a manner designed to attract public attention."

In order to have an "advertisement" within the terms of the policy the "notice" must be "broadcast or published," and therefore, the next inquiry should be as to the meaning of the terms broadcast and publish. The first and second definition of "broadcast" as defined in *Webster's Ninth*

New Collegiate Dictionary is: "to scatter or sow (as seed), and "to make widely known." However, a narrow reading of "broadcast" could use the term to refer to the transmission of a television or radio communications or the use of a loudspeaker.

There is nothing in the policy which indicates whether the insurance company or the ISO, which prepared the form policy, intended a broader or narrower interpretation of the word "broadcast." Obviously, from the standpoint of an insured who has purchased a commercial policy and an umbrella policy, the intention was to obtain the broadest coverage that was possible. There is no indication in the policy that the term "broadcast" means that the use of the public airwaves is required. We suggest that the most reasonable interpretation of the word broadcast is that it means an oral conveyance of the notice which would be expected to have wider dissemination that a single person. An advertisement may take the form of a truck stop operating a CB radio to communicate with passing truckers, an individual with a loud speaker or a salesperson who speaks to numerous customers one at a time. In each event there is wide dissemination of the knowledge through the use of the spoken word. The policy does not limit itself to the public airwaves and if this was the intention, then it should have been more clearly stated.

If the notice is not "broadcast" it may still qualify as an advertisement if it is "published." Unlike the term broadcast, the term "publish" does have a particular meaning and a legal history. It is defined in *Black's Law Dictionary, Revised Fourth Edition* as follows:

> "To make public; to circulate; to make known to people in general, (citations omitted). To issue, to put into circulation. (citations omitted) To utter . . . to declare or assert, directly or indirectly, by words or actions, that a forged instrument is genuine, (citations omitted). An advising of the public or making known of something to the public for a purpose"

The definition of publishing is interesting in the context of this case because Pro-Seal was

accused by Flowserve of asserting to the general public and to specific customers that counterfeit articles were genuine through imitation of the symbols, packaging and style of doing business used by Flowserve. This allegation is more than sufficient to convey the idea that the representation was "published." It is analogous to the concept of uttering and publishing which generally involves the same allegation, and it is important to note that the term "publish" in this context is any assertion whether direct or indirect, verbal or written. Therefore, using the first definitions provided above it is reasonable to conclude that the term "publish" is intended to include verbal, written, direct or indirect conveyance of the "notice."

The use of the words "or publish" expands upon the concept of broadcast. There is no necessity that publication involve communication with a large number of people. The act of conveying a notice concerning a product by displaying it in a place where it may be viewed by others who are then given the opportunity to see the product name, brand or manufacturer fulfills the requirements of "publish." The article may be viewed by ten people or by a thousand, but the publication takes place when it is made available or placed in circulation.

Communicating verbally to customers or delivering some notification concerning a products or service which is for sale also fulfills the definition of "publish." Many attorneys when engaged in a trial and desiring the jury to view a document will ask the court if they may "publish" the exhibit by handing it to the jury. Handing an exhibit to a jury may not be broadcasting, but it certainly constitutes publication. The information is provided to a member of the public and it becomes public information. It may be widely disseminated or there may only be a small number of customers to whom the notice is published or republished, but the notice becomes part of the public domain when it is delivered to any part of the marketplace. Placing a label on a package which

identifies the product within the package, and the source of the product constitutes an act of publication with respect to that item of information, and as a result of that act of publication the customer or the public is provided with information upon which it may make further inquiry as to how it can obtain the product or services contained within the package.

The next requirement under the policy is that the notice be conveyed to the general public or to specific market segments. In order that an advertisement be conveyed to the general public it seems clear that there should be some form of communication regarding the product or services that is placed within the circulation of the marketplace and becomes available to unspecified customers. For instance, when you walk down an aisle of a grocery store your vision is one of multiple products in divergent packaging with the manufacturer's name prominently featured. The display of the merchandise where a member of the public may see the product and acquire information concerning it would qualify as an advertisement which is published to the general public. A sign placed on a product's packaging which identifies the source of the product is an advertisement to the general public if it is publicly displayed.

There is no definition of "specific market segments" contained within the policy. Presumably, market segments refers to particular customers or vendors and is intended to cover situations in which the advertisement is not widely disseminated as would be the case with a television commercial, but is conveyed directly through salesperson to customer contact. If the facts behind the pleadings are examined in this case, it is apparent that the North Slope of Alaska is a very restrictive market where Pro-Seal and Flowserve competed, and the market segments may be divided into two primary customers, Connoco and British Petroleum. Communication with one company would be communication with a market segment because the market is restricted. Communication

with both companies would be communication with market segments, (combined, they are most of the market), and by its very nature would include a number of people and eventually would result in the general dissemination of the information. If the insurance company looks behind the pleadings, then this fact would be obvious.

Communication by a supplier of products or services (like Pro-Seal) with vendors who supply both Connoco, BP and other customers in the territory would also be an effective means of conveying information regarding products and services. Indeed, it may the best means of advertising. The definition contained in the policy does not limit the term advertisement to communication directly between the insured and the customer. If the insured communicates information to a vendor who is in contact with multiple customers, and that vendor repeats, republishes (either orally or in writing) or publicly displays the information provided by the insured, then there has been a notice that has been disseminated. Likewise, if there is a location in which a company's wares may be displayed so that a potential customer might observe or otherwise become aware of the availability of the product or service, then that would also qualify under the definition. One need only think of that walk down a grocery store aisle to be met with a vision of products separated by subject matter and distinguished only by their labels and packaging. Consequently, the use and display of distinctive labels or packaging may also be said to be a form of and included within the definition of an "advertisement."

The definition of "advertisement" contained in the commercial policy does not require that there be a course of conduct, but certainly, if there is a course of conduct in which representations are made about a company's products or services, then there is a course of advertising. The Flowserve Complaint certainly alleges a course of conduct in which representations were made about

their products and services.

An advertisement may be written or oral. It may occur on a single occasion or it may occur a multitude of times. Indeed, it may take any form in which a business attempts to promote its products and attract customers by distinguishing itself from its competitors. From the sign on its door and the color of its letterhead to the size, shape and color of the labels it places on its products, each form of communication from a sales organization to its customers is a form of advertisement designed and desired to distinguish itself from all others.

The foregoing analysis demonstrates that there are two areas of inquiry to be made in determining whether there has been an advertisement:

1. Is there a notice concerning a company's products or services.

2. Was the notice broadcast or published to the general public or specific market segments.

In this case the Complaint drips with allegations that Pro-Seal was communicating information about its products and services and that the result was confusion in the market place and by specific customers. It is simply not possible for there to confusion in the market place if there is no notice broadcast or published to the public or to a market segment concerning the product. The market cannot become confused in a vacuum.

WHAT IS A "PERSONAL AND ADVERTISING INJURY?"

A "personal and advertising injury" is defined by the commercial policy on page 12, paragraph 14 as an injury:

arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy or a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization goods, products or services:
e. Oral or written publication of material that violates a person's right of privacy;
f. The use of another's advertising idea in your "advertisement;" or
g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

Subparagraphs f and g are relevant to this case and it is important to remember the context in which they are contained. Subparagraphs f and g are the last two in a series of intentional torts and "offenses" for which insurance protection is afforded. Contrary to the arguments presented by Citizens, Pro-Seal argues that both provisions are applicable to this case.

The prior briefs filed by the parties exhaustively examine the numerous decisions that have been made across the country concerning this provision of the insurance policy. There are two appendixes attached to Pro-Seal's Brief in Response to Application for Leave to Appeal that contain numerous references to decisions finding that the above quoted provisions in an insurance policy require coverage to be provided afforded for claims of unfair competition, trade mark infringement and trade dress infringement. We will not repeat those references in this supplemental brief in accordance with the Court's Order. However, we would like to supplement our previous arguments.

Where the policy states that it covers an alleged injury arising from an "offense" in which another's advertising idea is used in the insured's advertisement, the policy provides a broad and ambiguous coverage. What is an "advertising idea?." Nowhere in the policy is there a definition nor does the term appear in any dictionary of which we are aware. It must be considered to be a term

of art and its construction depends on the art that is being applied.

Certainly trademarks and trade dress constitute an advertising idea as they are simply symbols and methods through which a business seeks to connect the source of its products or services with the mind of the customer. Appendixes A and B contain numerous cases which confirm this fact. Likewise, the use of colors, shapes, textures, and stylized logos and letters represent an effort to connect the provider of the product or service with the use of the product or service in the mind of the customer. The use of re-usable containers, which have a recognizable shape, color, size or texture, and that allow for the shipment and the storage of a product represent the use of an idea in marketing a product which notifies the customer by sight that a particular product or service comes from a particular source. The re-usable Flowserve containers with the Flowserve trademark, which are used to ship, display and store the product are easily distinguishable from the packaging of other companies. Even standing in the customers inventory with other supplies, the color, shape and name is continually repeated each time the customer looks at the package. Ideally, the customer sees the package and knows immediately the source of the product. This is why Pro-Seal used a Red Sign to label the package in which its product was contained so that the public and the customer would know that this was a product serviced by Pro-Seal. This is the very essence of advertisement.

THE EXCLUSION FOR ACTS COMMITTED BY THE INSURED WITH KNOWLEDGE THAT THE ACT WOULD VIOLATE THE RIGHTS OF ANOTHER AND WOULD INFLICT PERSONAL AND ADVERTISING INJURY IS CLEARLY NOT APPLICABLE.

In addition to alleging that the acts which created a cause of action for unfair competition, trademark infringement, Lanham Act violations and trade dress violations, Flowserve alleged that the acts were committed willfully, fraudulently and with knowledge such that Flowserve should be

entitled to treble damages and attorneys fees. Citizens contends that these allegations activate the exclusion. However, as we pointed out in our original brief, the exclusion contained in this policy requires an application of a subjective standard and a factual determination that the insured specifically knew that it was violating the rights of another and causing an advertising injury. *SMDA v American Insurance Co*, 225 Mich App 635; 572 NW2d 686 (1997). No such determination was ever made and in order to make such a determination the Court would be required to find that a company that specializes in repairing mechanical seals has a legal knowledge equivalent to a law school degree and several years of experience.

The Flowserve Complaint contains allegations of certain acts. It also contains allegations that the acts were committed with a certain intent. There is a difference which Citizens asks the Court to ignore.

Where the law requires that a particular intent be proven as a condition precedent to recovery, and the only basis on which a complainant may recover is to prove that particular intention, then that cause of action may be subject to an exclusion if the exclusion has as its basis, that particular element of intent. For instance, most assaultive crimes are subject to an exclusion for acts intended by the insured to cause an injury. However, where the law does not require that a particular intent is a condition precedent to recovery, then no exclusion applies, even though an allegation of intention is made in order to enhance a claim for damages. The issue was briefed in great detail by both parties. There have been additional cases which apply the same law; for instance. *Cosser v. One Beacon Ins. Group*, 15 A.D.3d 871, 789 N.Y.S.2d 586, N.Y.A.D. 4 Dept. (2005), but the principle cited in our original brief remain the same and is contained in Appendixes A and B.

Citizens contends that the only way that Flowserve could prevail on its Complaint was to

prove that Pro-Seal knew that a personal and advertising injury was going to result as a result of its actions. Citizens position on this matter is clearly wrong.

AK ST s 45.50.471 and 15 USC 1125 do not require that the alleged confusion be caused intentionally or with any knowledge. The statutes simply require that confusion be caused as a result of a representation. The means of causing the confusion is a matter of factual proof. The confusion may be caused by numerous acts which need only be generally described in the Complaint. Furthermore, the Flowserve Complaint makes separate references to the "acts" which set forth the cause of action and the allegedly wrongful intention which would allow for enhanced damages. (See Count I and II of the Flowserve Complaint)

If confusion is caused as a result of using Flowserve's packaging or using other elements of Flowserve's presentation of its products to the extent that they are unique, (for instance, Flowserve alleged that Pro-Seal placed assembly drawings in the packaging in order to imitate Flowserve's practice to do the same), then a violation of trade dress and unfair competition may be proven without there being any evidence that the act was committed with any particular intent. This falls within the "style of doing business" as set forth in the insurance policy.

The Lanham Act section 15 USC 1125 (a)(1)(A), which is cited in the Flowserve Complaint, is a codification of trade mark and trade dress common law. Indeed, 15 USC 1125(a)(3) specifically refers to an action for trade dress infringement under 15 USC 1125(a). It corresponds with the Alaska unfair competition statute. Unfair competition encompasses both the law of trade mark infringement and trade dress infringement, and under the broadly interpreted Federal Rules of Civil Procedure, a complaint alleging unfair competition protects the pleader's claims for recovery under theories of trade mark infringement or trade dress infringement. The only necessity that Flowserve

had to fulfill in order to obtain jury instructions regarding trade dress infringement would be to offer some proof that unique features of Flowserve's presentation were used by Pro-Seal. Flowserve was halfway to the mark because Pro-Seal had actually used Flowserve's unique re-usable packaging in advertising Pro-Seal's repair services. Indeed, it is clear that the packaging would have been an exhibit at the trial.

If, in addition to proving that the acts were committed, Flowserve also proved that they were committed willfully or with a *mens rea*, then Flowserve would be entitled to treble damages and in some cases they would also be entitled to a recovery of attorneys fees. If Flowserve offered no proof or inadequate proof of intention, then they still may recover simply based upon the confusion created in the marketplace by an innocent act.

It is apparent that there are many allegations in the Complaint which contain no reference to intention. For instance, paragraph 35. It simply states that Pro-Seal has "competed unfairly" by "misrepresenting that Pro-Seal products to be Flowserve Products." If the allegation is proven, with or without intention, and with or without reference to the remaining allegations of the Flowserve Complaint, then a violation of Alaska Statute AK ST s 45.50.471 would be found. No further allegations are needed and no further proof would be needed in order to prevail. Flowserve has alleged a fact, i.e., that Pro-Seal misrepresented the source and origin of its products, it has alleged that there is a violation of law; i.e., the Alaska Unfair Competition Statute, and it has alleged that it is entitled to relief in the form of damages for lost sales and an injunction.

RESPONSES TO CITIZENS OTHER ARGUMENTS

The weight of authority finding that advertising is inherently bound up with the use of trademarks and trade dress is well founded and in accordance with common experience. (See

Appendix A and B to Appellee's Brief in Response to Application for Leave to Appeal) A trademark and trade dress are inherently connected to serve the sole purpose of establishing a connection between the product and the source of the product in the mind of the consumer. A trademark and trade dress inherently convey to the customer the quality, reputation and good will that is associated with the producer. When a trademark or trade dress is used with a product or service, its sole purpose is to notify that customer and the public that the product or service associated with the trademark or trade dress comes with the same quality and characteristics that the consumer has come to associate with the source of those and other goods and services. To deny that the use of a trademark or trade dress in commerce is an advertisement is like saying that air does not contain oxygen.

In response to this inescapable logic, Citizens argues that there must be "something more" (Appellant's Application for Leave, p. 40.) Our question in response to this so called argument is; Why? Why does there have to be something more than the plain English used in the policy, and if there has to be something more, shouldn't it be the responsibility of the insurance company to provide an explanation of what this "something more" is? Indeed, the fact that the insurance policy has undergone several modifications and the existence of numerous decisions which hold that trademark and trade dress claims inherently involve advertising injuries indicate that there is nothing more.

Citizens claims that the ISO modified the policy to limit its coverage (Appellant's Application for Leave, p. 6, 36), but Citizens does not give the full story. Prior to 1986, there was a specific exclusion in most policies which excluded coverage for trademark claims. That exclusion was removed in 1986, and an insured could reasonably infer that such claims were covered based

upon the 1986 amendment. *Industrial Molding v American Mfrs Mut. Ins Co,* 17 F Supp 2d 633, 639 (ND Tex, 1998). In view of the number of cases which have specifically addressed this issue and found that coverage existed, it now becomes incumbent on the insurance company to provide an unambiguous exclusion if the policy is not intended to cover such claims.

Some of the allegations made in the Flowserve Complaint are so harsh that we believe one of the reasons that the Circuit Court found that the exclusion applied was because the Complaint falsely made Pro-Seal out to be some kind of rogue and reckless group who traded off the good will of another company and endangered public safety. Those allegations have been proven to be false. However, it is an issue that Citizens has taken advantage of and use out of context. Citizens argued in its Reply Brief at page 2 that Pro-Seal conceded that the allegations of the Complaint did not allege trade dress infringement. This is completely wrong. Indeed, Pro-Seal argued that the allegations were of such a nature that a person unversed in the concepts of trademarks and trade dress might conclude that they were all true and that Pro-Seal was guilty of such extreme conduct that they did not deserve the protection provided by an insurance policy. As we have tried to point out, Pro-Seal acted appropriately and within the law at all times.

Citizens complained in their Reply Brief that we did not reply to their citing two unpublished federal district court opinions and one published district court opinion. The authorities that we have cited include 5 Federal Circuit Court decisions and numerous District Court decisions. There have now been more than 100 pages of arguments made in this case. Citizens is unable to make any creditable argument in response to Pro-Seal's point that the great majority of Courts to have addressed the issues presented in this case would find in favor of Pro-Seal's position. Citizens cites one decision of note, the decision of the 6th Circuit in *Advance Watch Co, Ltd. V Kemper Natl Ins*

Co, 99 F3d 795 (6th Cir, 1996). We have shown that the decision in *Advance* has no applicability to this case.

Three judges from the Court of Appeals have found that there is coverage under the policy. The Opinion of the Circuit Judge found that there was coverage by implication. Five Federal Circuit Courts have found coverage under similar circumstances. If this Court should be in disagreement with these findings, then the disagreement would be cogent evidence of an ambiguity. If an ambiguity is defined as the recognition that reasonable people may honestly disagree regarding the interpretation of word or clause, and this Court disagrees with the authorities cited by Pro-Seal, then the proper conclusion would be that there is an ambiguity. If there is an ambiguity, it should be construed against the insurance company and in favor of the insured until such time as the insurance company provides more precise language. *Radenbaugh v Farm Bureau General Ins*, 240 Mich App 134; 610 NW2d 272 (2000).

CONCLUSION

Citizens is asking this Court to artificially redefine and limit the scope of its insurance policy against the great weight of numerous other decisions across the country and in defiance of the plain meaning of the words which the insurance company chose to use. The Court should decline this invitation and deny the Application for Leave.

PIERCE, DUKE, FARRELL & TAFELSKI, PLC

Dated: June 8, 2006

By: _____
Mark C. Pierce (P25946)
Attorneys for Appellee

STATE OF MICHIGAN

IN THE SUPREME COURT

CITIZENS INSURANCE COMPANY,

Plaintiff,
Counter-Defendant-Appellant,

v

PRO SEAL SERVICE GROUP, INC., d/b/a PRO SEAL, INC., a Michigan corporation,

Defendant,
Counter-Plaintiff-Appellee,

and

FLOWSERVE CORPORATION, A New York corporation, FLOWSERVE MANAGEMENT COMPANY, a Delaware corporation, SETH SHORT and RANDY QUINCY,

Defendants.
_____/

Supreme Court No. 130099

COA Docket No. 262759

Lower Court: Oakland County
Circuit Case No. 04-056953-CZ

PROOF OF SERVICE

Judith A. Stadler, certifies that on June 9, 2006, she served Defendant, Counter-Plaintiff-Appellee's Supplemental Brief upon Jeffrey C. Gerish, Plunkett & Cooney, 38505 Woodward Ave., Suite 2000, Bloomfield Hills, MI and to William E. Osantowski, Esq., Foley & Mansfield, P.L.L.P., 24255 W. Thirteen Mile Road, Suite 200, Bingham Farms, MI 48025 by first class mail.

Dated: June 9, 2006

Judith A. Stadler